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No. ____

In the

Supreme Court of the United States

HONORABLE BOB RILEY, as Governor of the State of Alabama,
Appellant,

v.

FRED L. PLUMP,
Appellee.

On Appeal from the United States District Court for the Middle District of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The facts of this § 5 appeal are similar to those presented in *Riley v. Kennedy*, No. 07-77. That case concerned the application of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to a gubernatorial appointment filling a vacancy on the Mobile County Commission and the Alabama Supreme Court decisions requiring that appointment. This case involves an appointment to the Jefferson County Commission made pursuant to those same Alabama Supreme Court decisions. As was the case for Mobile County, there is a local law that provides for special elections to fill vacancies on the Jefferson County Commission, while the general law applicable to the entire State provides for gubernatorial appointment. However, and also like the Mobile County case, the Jefferson County local law, Act No. 77-784, violates the Alabama Constitution for reasons wholly unrelated to voting. *See Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Accordingly, state law requires Governor Riley to appoint, and he has done so.

The plaintiff filed this litigation raising § 5 claims, Docket No. 1, and he later amended the complaint to include additional claims, Docket No. 5. He also moved for a preliminary injunction. Docket No. 6. The three-judge district court conducted a hearing to consider the plaintiff's motion for preliminary injunction and then skipped to the merits, entering a judgment ordering that Governor Riley's appointment be vacated if not precleared. The permanent injunctive relief was structured so that it would automatically spring into being, "without further order of th[e] court," if the

Governor's appointment was not precleared by a date certain. *See* Amended Judgment, Appendix 16a. By order dated April 18, 2008, this Court stayed the district court's judgment. *See Riley v. Plump*, No. 07A841.

This appeal presents the following questions:

1. Whether the decisions of a covered jurisdiction's highest court concerning the validity of a precleared state law, or, in the alternative, an appointment made by the Governor of the State in compliance with those decisions, requires preclearance pursuant to § 5.

2. Whether § 5 requires preclearance of the implementation of a practice in force and effect on the coverage date of November 1, 1964.

3. Whether the district court erred when it entered judgment after briefing and oral argument on the plaintiff's motion for preliminary injunction, without providing the notice required by Fed.R.Civ.Proc. 65(a)(2).

PARTIES TO THE PROCEEDINGS

BOB RILEY, in his official capacity as Governor of the State of Alabama, is the appellant in this case and was the defendant below.

FRED L. PLUMP is the appellee in this case and was the plaintiff below.

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JURISDICTIONAL STATEMENT

Bob Riley, in his official capacity as Governor of the State of Alabama, appeals from the decision of the three-judge district court declaring that his appointment of General George F. Bowman to a vacant seat on the Jefferson County Commission is subject to the preclearance requirements of § 5, and ordering that the appointment be vacated without further order if not precleared.

OPINIONS BELOW

The district court's Memorandum Opinion has not yet been published, but appears as *Plump v. Riley*, ___ F. Supp. 2d ___, 2008 WL 192826 (M.D. Ala. Jan. 22, 2008) (three-judge court), and is reprinted at Appendix 1a. The district court's original judgment is reprinted in the Appendix at 12a, the amended judgment at Appendix 16a, and the order regarding the Amended Judgment at 14a.

JURISDICTION

This case arises under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Appendix 41a. Jurisdiction in the three-judge district court and in this Court is proper pursuant to 42 U.S.C. § 1973c(a), which states, in pertinent part, "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." On March 22, 2008, within 60 days of the date of the judgment, *see* 28 U.S.C. § 2101(b), Governor Riley filed his Notice of Appeal. Appendix 37a. For reasons that will be explained below, Governor Riley

filed a second Notice of Appeal on May 20, 2008. Appendix 72a.

The district court's judgment, even as amended, is curious, and Governor Riley has expressed concerns about its finality since it was issued. *See* Response to Plaintiff's Motion to Amend, Appendix 24a; Notice, Appendix 31a; Notice of Appeal, Appendix 37a. He set out three concerns in his response to the plaintiff's motion to alter or amend the original judgment, *see* Appendix 25a-27a, and each of these is addressed here in order to show why, on balance, this Court should conclude that it now has jurisdiction.[1]

1. The first concern expressed by the Governor was that the three-judge court did not resolve all the claims in the plaintiff's amended complaint. Appendix 25a. Specifically, the court failed to address plaintiff's claims raised under § 2 of the Voting Rights Act and the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. *See* Amended Complaint, Docket No. 5. Nor did the District Court cite Fed.R.Civ.Proc. 54(b), which provides that when there are multiple claims, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

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[1] As discussed below, the district court's judgment in this case is materially different from the non-final declaratory judgment of coverage initially entered in *Riley v. Kennedy*, No. 07-77. *See Riley v. Kennedy*, 07-77, Bl. Br. at 17-22; *id.*, Yellow Br. at 1-2. To argue that the judgment in this case should be treated as final is in no way a retreat from Governor Riley's position concerning jurisdiction in *Riley v. Kennedy*.

reason for delay."[2] However, this is not a bar to jurisdiction.

The unresolved claims must be resolved by a single judge, not the three-judge court. *See* 42 U.S.C. § 1973c (providing that § 5 claims are resolved by a three-judge court); *Bond v. White*, 508 F.2d 1397, 1400-1401 (5th Cir. 1975) (three-judge court properly remanded remaining claims to single-judge court after deciding § 5 claims); *Gordon v. Executive Comm. of the Democratic Party of Charleston*, 335 F.Supp. 166, 170 (D.S.C. 1971) (three-judge court) (per curiam) (holding that claims not committed to a three judge court "can be asserted only before the [single-judge] District Court"). *But see Armour v. Ohio*, 775 F.Supp. 1044, 1048 (N.D. Ohio 1991) (three-judge court) (holding that once a three-judge court is convened, it has jurisdiction to consider all the claims in the case). Thus, all claims properly before the three-judge court were addressed on the merits.[3]

2. The second concern expressed by the Governor was that the court may have lacked authority to skip

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[2] The district court did not mention Rule 54(b) or make the determinations required by the Rule. The judgment directed the clerk to enter the judgment as a final judgment pursuant to Fed.R.Civ.Proc. *58*. Amended Judgment, Appendix 16a.

[3] Notably, neither the plaintiff nor the district court has taken *any* further action with respect to the plaintiff's remaining claims. In any event, it would make no sense, and would not further the interests of judicial economy, to require Governor Riley to wait upon resolution of the single-judge claims before appealing to this Court. Any appeal of those single-judge claims would be lodged in the Eleventh Circuit: While § 5 provides for direct appeals to this Court, 42 U.S.C. § 1973c(a), § 2 has no such provision, 42 U.S.C. § 1973.

to final judgment when the motion pending before the court was for a preliminary injunction. Appendix 25a-26a. Upon reflection, this is not an issue of finality or jurisdiction at all. There is, however, an issue concerning whether Governor Riley received notice to which he was entitled pursuant to Fed.R.Civ.P. 65(a)(2), and that issue is discussed below. *See* Section IV, below.

3. The third concern expressed by the Governor was that the court's remedy order provided for what can only be described as contingent, springing injunctive relief. *See* Appendix 26a-27a.

The district court acted as a *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), court, considering "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *Id.* As to the first inquiry, the district court held that the Governor's appointment was a change that must be precleared. Memorandum Opinion, Appendix at 7a. As to the second, the parties agreed that the change, if there was a change, had not been precleared. As to remedy, the district court ordered that the Governor had 90 days to obtain preclearance, and that if the appointment was not precleared within such time, the appointment "shall be vacated 90 days from January 22, 2008 without further order of th[e] Court." *See* Amended Judgment, Appendix 16a. Had Governor Riley appealed to this Court immediately, rather than seeking preclearance, the appointment would have been vacated on February 5, 2008. Appendix 16a.

Accordingly, the court's remedy was that the Governor's appointment might be vacated on February 5, 2008, or it might be vacated on April 21, 2008 (90-days from January 22, 2008), or it might not be vacated at all (if preclearance were timely obtained).

Consistent with the district court's order, the Governor noticed his intent to seek preclearance, Appendix 31a, thereby eliminating the possibility that the appointment would be vacated on February 5. Out of an abundance of caution, Governor Riley noticed his appeal on March 22, 2008, Appendix 37a, within 60 days of the January 22 Judgment, the January 25 Amended Judgment, and the February 5 potential vacatur. Hence, to the extent that the court's judgment was final on any of these dates, the March 22 notice of appeal was timely filed. 28 U.S.C. § 2101(b).

While the district court's judgment in this case is different from the piecemeal orders of the district court in *Riley v. Kennedy*, No. 07-77, the jurisdictional arguments raised by the Appellees in *Kennedy* influenced Governor Riley's decision to appeal at this time. There, the district court initially ruled only that the Governor's appointment must be precleared, and made no remedy order whatsoever. *Kennedy v. Riley*, 445 F.Supp.2d 1333 (M.D. Ala. 2006) (three-judge court). The district court determined it would do nothing until the United States Department of Justice ruled on preclearance and that it would revisit the remedy issue at that time. *Id.* Only when preclearance was denied did the district court order that the Governor's appointment to the Mobile County Commission be vacated, thereby finally resolving the case. *Kennedy*

v. Riley, ___ F.Supp.2d ___, 2007 WL 1284912 (M.D. Ala. May 1, 2007) (three-judge court). The appellees in *Kennedy* argued that Governor Riley should have appealed before the district court entered its remedy order. Governor Riley disagrees, for the reasons stated in his briefs in that case, but to avoid a replay of the argument – and out of an abundance of caution – Governor Riley opted in the very different circumstances of this case (and particularly in light of the district court's contingent, springing remedy order) to appeal when he did.

As the April 21, 2008 deadline to achieve preclearance approached, Governor Riley sought a stay pending appeal from the district court. Docket No. 42. The court denied the motion, but stayed its judgment "until the earlier of sixty days from the date of the preclearance submission [*i.e.*, until May 19, 2008], or the date of the written response by the Attorney General to [the] preclearance submission." Docket No. 45.[4] Under this order, the Governor's appointment might have been vacated at any time between April 21, 2008 (the judgment's original deadline) and May 19, 2008 (the final date authorized by the district court stay), depending on when and how the United States Department of Justice acted.[5]

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[4] The court did open the door to a request for a further motion to stay in the event that the USDOJ requested more information, rather than making a final determination, within the 60-day window provided to it by § 5. Docket No. 45.

[5] By letter dated May 8, 2008, USDOJ requested more information. Accordingly, the preclearance submission remains pending.

Unconvinced that the district court's stay order protected his interests, Governor Riley sought a stay pending appeal in this Court and the stay was granted. *See Riley v. Plump*, No. 07A841. Accordingly, the Governor's appointment will not be vacated unless this appeal is finally resolved against him and the State is unable to obtain preclearance.

On May 20, 2008, Governor Riley filed a second notice of appeal. Appendix 72a. This notice was filed within 60 days of the original April 21 deadline as well as within 60 days of the variable deadline set by the district's stay order (May 19 or sooner). Hence, to the extent that the district court's judgment was final on any of these dates, the May 20 notice of appeal was timely filed. 28 U.S.C. § 2101(b).

In sum, the jurisdictional issue sets up very differently here than it did in *Riley v. Kennedy*. There, for reasons explained in the Governor's briefs, the district court's preliminary declaratory judgment of § 5 coverage was not final. Here, by contrast, while it was unclear in late January which – if any – remedy would materialize, it was clear that Governor Riley was "effectively out of court." *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 10 (1983) (judgment was final for purposes of appellate jurisdiction when the district court's order put the appellant "effectively out of court"). *Accord, Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962). By stating up front that Governor Riley's appointment would be vacated "without further order of th[e] court," the district court took pains to ensure that its adjudication of the § 5 claim left "nothing for the court to do but execute the judgment." *Catlin v.*

United States, 324 U.S. 229, 233 (1945). Since then, four months have passed, and Governor Riley has filed two notices of appeal – covering the entire range of dates on which the court's judgment might have become final. This Court's stay order is the only reason that the Governor's appointment has not yet been vacated. On balance, then, this Court should conclude that the district court's order has achieved finality and that one or the other of the notices of appeal was timely filed, such that this Court has jurisdiction over this appeal.[6]

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the application of § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Appendix 41a. While the application of § 5 in this case raises constitutional concerns, those concerns were not addressed by the three-judge court. Rather, that court simply applied the test set out in *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

STATEMENT OF THE CASE

A. Legal Proceedings.

This § 5 litigation involves two decisions of the Alabama Supreme Court, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), and their effect on the method of filling vacancies on the Jefferson County Commission. These decisions are reprinted in the Appendix at 54a and 64a. respectively.

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[6] Pursuant to Supreme Court Rule 18.2, this Jurisdictional Statement is filed for both notices of appeal.

From 1868 until 2004, Alabama's general law provided that vacancies on the county commissions of the State's 67 counties were to be filled by gubernatorial appointment. Stipulations, Docket No. 19 at ¶ 1. A handful of counties had contrary local laws. A 1985 local law, Act No. 85-237, provided for the filling of vacancies on the Mobile County Commission by special election. That Mobile County local law was the subject of *Stokes v. Noonan* and *Riley v. Kennedy* in the Alabama Supreme Court, and of *Riley v. Kennedy*, No. 07-77, in this Court.

A separate local law, Act No. 77-784, applied to Jefferson County. Appendix 44a. Like the Mobile County local law, the Jefferson County local law provided for a special election to fill commission vacancies, *id.*, and was precleared, Stipulations, Docket No. 19 at ¶ 4. Two back-to-back vacancies occurred in Jefferson County in 1982 and were filled by special election. However, in 1988, the Alabama Supreme Court held that a local law violates § 105 of the Constitution of Alabama (1901), reprinted at Appendix 53a, if it provides one means of filling vacancies when a general law provides another means. *Stokes v. Noonan*, 534 So. 2d 237 (1988). *Stokes v. Noonan* arose in Mobile County and did not specifically consider the Jefferson County local law, but it established a rule of law that applies to local laws, such as Act No. 77-784, that share the same unconstitutional characteristics as the Mobile County local law. Therefore, when the next vacancy occurred on the Jefferson County Commission (in 2001), the practice of special election was abandoned, the vacancy was filled by gubernatorial appointment (by then-Governor Don Siegelman, a Democrat), *see* Stipulations, Docket 19 at ¶ 5, and no one challenged that appointment under § 5.

In 2004, the general law of Alabama was amended to allow for local laws requiring special elections to fill vacancies. Act No. 2004-455, reprinted at Appendix 50a. However, the Alabama Supreme Court held that the 2004 amendment failed to include unambiguous language requiring retroactive application and, thus, it did not give effect to the prior-passed (1985) Mobile County local law. *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). By the same reasoning, the 2004 amendment is inapplicable to the prior-passed (1977) Jefferson County local law.[7]

In October 2007, Jefferson County Commissioner Larry Langford was declared the winner of the Birmingham mayoral election, Stipulations, Docket No. 19 at ¶ 7. Assuming the new office would cause a vacancy on the county commission, local officials scheduled a special election pursuant to Act No. 77-784, Docket No. 19 at ¶ 8. On November 13, 2007, Langford resigned his commission seat. *Id.* at ¶ 7. Plaintiff filed his original complaint on November 16, 2007. Docket No. 1. On November 21, 2007, Governor Riley appointed General George F. Bowman to the vacant commission seat. Docket No. 19 at ¶ 19.

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[7] In 2007, the general law was again amended by Act No. 2007-488, reprinted at Appendix 51a. The 2007 amendment, which has not been precleared, contains the same language as the 2004 amendment to allow exceptions for subsequently-passed local laws. Also like the 2004 amendment, the 2007 amendment does *not* contain unambiguous language specifying that it would apply retroactively. The meaning of the 2007 amendment, and whether it may be applied retroactively, is one of the issues in the appeal pending before the Alabama Supreme Court, discussed below.

On November 27, 2007, plaintiff filed an amended complaint adding claims of violation of § 2 of the Voting Rights Act and of his rights under the Thirteenth, Fourteenth, and Fifteenth Amendments. Docket No. 5. He filed a motion for preliminary injunction that same date. Docket No. 6.

On December 18, 2007, after the convening of a three-judge court, the district court ordered that "[u]pon consideration of the Motion for Preliminary Injunction, . . . [o]ral argument on the motion is set for January 15, 2008 at 10:00 a.m. . . ." Order, Appendix 19a. On January 10, 2008, the court ordered "that oral argument on the plaintiff's Motion for Preliminary Injunction set for January 15, 2008 at 10:00 A.M. is rescheduled for January 15, 2008 at 9:00 A.M. (CST)." Order, Appendix 21a (emphasis omitted).

The district court heard oral argument as scheduled on January 15, 2008. Then, on January 22, 2008, the three-judge federal court entered judgment against Governor Riley. *See* Judgment, Appendix 12a. On the plaintiff's motion to amend, Appendix 22a, and Governor Riley's response, Appendix 24a, the court filed an amended judgment on January 25, 2008, Appendix 16a, to clarify its intentions. The court held that the Governor's appointment, made pursuant to the Alabama Supreme Court decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, was a change that could not be enforced unless precleared. The court ordered that the Governor's appointment would be vacated in 90 days "without further order of th[e] Court" if the Governor had not obtained preclearance by that time. Alternatively, if Governor Riley immediately appealed, the appointment would be vacated on

February 5, 2008. *See* Order, Appendix 14a; Amended Judgment, Appendix 16a.

Governor Riley gave notice that while he disagreed with the district court's ruling that § 5 requires preclearance of his appointment, he intended to request such preclearance. *See* Notice, Appendix 31a. The State made a submission to USDOJ by letter dated March 18, 2008. *See* Notice, Appendix 34a. USDOJ has requested more information and the submission remains pending.

On March 22, 2008, Governor Riley filed his notice of appeal of the three-judge district court's final judgment. Appendix 37a. He filed a second notice of appeal on May 20, 2008. Appendix 72a.

After the district court ruled, Jefferson County voters filed a state court action concerning the validity of the special election under state law, an issue that the district court appropriately declined to decide. They sought to stop the special election that was scheduled for February 5, 2008. The Circuit Court declined to enter emergency injunctive relief and the election was held. The plaintiffs appealed and the Alabama Supreme Court entered an order enjoining local officials from declaring the results of the special election and remanding the case to the Circuit Court for a decision on the merits. Governor Riley intervened. The Circuit Court ruled that, in spite of the clear decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, the Jefferson County local law was valid and the election was, therefore, valid as a matter of state law. Governor Riley and aligned parties immediately appealed to the Alabama Supreme Court. Briefing is complete and the parties have been notified that oral argument will be set for June 4, 2008. *Riley, et al. v. Jefferson County*

Election Comm'n, et al., Alabama Supreme Court Nos. 1070850, 1070893, 1070917.[8]

B. Statement of Facts.

In 1977, the Alabama Legislature passed Act No. 77-784 which, like the Mobile County local law, discussed above, provided that vacancies on the Jefferson County Commission be filled by special election. While Act No. 77-784 was not the specific subject of the Alabama Supreme Court decisions in *Stokes v. Noonan* and *Riley v. Kennedy*, the Jefferson County local law is indistinguishable in all relevant respects from the Mobile County local law, and logically the two are equally unconstitutional. Under *Stokes v. Noonan*, Act No. 77-784 violates § 105 of the Alabama Constitution. Under *Riley v. Kennedy*, it is not given effect by subsequently-passed amendments to the general law.

Two vacancies arose on the Jefferson County Commission in 1982, before *Stokes v. Noonan* was decided, and those vacancies were filled by special election pursuant to the local law. *See* Memorandum Opinion at Appendix 3a. The next vacancy known to arise on the Jefferson County Commission occurred in 2001, after *Stokes v. Noonan* but before the 2004

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[8] If the Alabama Supreme Court rules consistently with its prior opinions in *Stokes v. Noonan* and *Riley v. Kennedy*, then the Governor's appointment was valid as a matter of state law, leaving its validity under § 5 to be decided. If the Alabama Supreme Court rules for some reason specific to this case that the Jefferson County local law (unlike the Mobile County law invalidated in *Stokes v. Noonan*) does *not* violate the Alabama Constitution, then the Governor's appointment was invalid under *state* law, and the plaintiff's federal claims would likely be moot.

amendment to the general law. That vacancy was filled by gubernatorial appointment, without any challenge from any party on § 5 (or any other) grounds. *See id.*; Stipulations, Docket No. 19 at ¶ 5.

In October 2007, Jefferson County Commissioner Larry Langford, an African-American, was declared the winner in an election for the office of Mayor of the City of Birmingham. He resigned his seat on the Commission on November 13, 2007. *See* Memorandum Opinion at Appendix 4a.

On October 29, 2007—after the mayoral election and before Langford's resignation—the Jefferson County Election Commission (the local body with authority to call special elections pursuant to Act No. 77-784) passed a resolution calling for a special election on February 5, 2008, "in the event of" a vacancy. *See id.* Plaintiff filed this action on November 16, 2007. *See* Complaint, Docket No. 1.

On November 21, 2007, Governor Riley appointed General George F. Bowman to the seat vacated by Mayor Langford. Stipulations, Docket No. 19 at ¶ 19. Commissioner Bowman, an African-American, is a retired two-star army general and the son of a Tuskegee airman. *Id.* at ¶ 20.

The district court held a hearing on plaintiff's motion for preliminary injunction on January 15, 2008, and entered judgment on January 22, 2008. The district court found that the Governor's appointment was a "change" for purposes of § 5 and must be precleared to be enforceable. *See* Memorandum Opinion, Appendix 1a; Amended Judgment, Appendix 16a.

After entry of judgment, the special election was held on February 5, 2008, but the Alabama Supreme

Court enjoined local officials from announcing the results. (Commissioner Bowman participated in that election, and according to unofficial returns did not receive the most votes.) The appeal of the state court litigation is pending.

ARGUMENT

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, precludes a covered jurisdiction from enforcing a standard, practice, or procedure that affects voting – *if* it is different from the standard, practice, or procedure in force or effect on the coverage date (in Alabama's case, November 1, 1964) – unless the Attorney General of the United States declines to object to the change, or unless a three-judge federal district court sitting in the United States District Court for the District of Columbia declares that the change has neither the purpose nor the effect of discriminating on the basis of race. 42 U.S.C. § 1973c, Appendix 41a.

This case presents the question of whether a "change" to a voting practice must be precleared when it is mandated by two decisions of the Alabama Supreme Court that deprived the relevant precleared state Act of operative effect.

This case also presents an important question concerning the intersection of federal and state law that highlights the constitutional tensions inherent in § 5. Before a state statute that affects voting can be enforced, it must be both valid as a matter of state law *and* precleared. Otherwise, if a subsequent practice is not precleared, the covered jurisdiction will be forced to keep in place a practice that has no basis in state law. As a result of the interpretation of § 5 by the three-judge district court, assuming the

Governor's appointment is not precleared, Alabama will be compelled to give effect to a special election conducted pursuant to a state statute that is unconstitutional.

In addition, this case presents the question of whether the implementation of a voting practice that was in force or effect on the relevant coverage date, here November 1, 1964, is subject to the preclearance requirements of § 5.

Finally, the case presents an issue of the application of the Federal Rules of Civil Procedure. The district ordered briefing and hearing on the plaintiff's motion for preliminary injunction. Appendix 19a, 21a. After that hearing, and without giving the notice required by Fed.R.Civ.P. 65(a)(2), the district court skipped to the merits and entered judgment against Governor Riley. Judgment, Appendix 12a; Amended Judgment, Appendix 16a.

This appeal is similar to that in *Riley v. Kennedy*, No. 07-77, and Governor Riley adopts his arguments from that case.

I. A decision by a covered jurisdiction's highest court that a precleared state law is unconstitutional and, thereby, invalid as a matter of state law is not a change that requires preclearance.

The Governor's appointment of Commissioner Bowman is not subject to § 5 for several reasons, many of which were discussed at length in *Riley v. Kennedy*, No. 07-77. Those arguments are summarized in this Section I and in Section II, below.

A. Text. The *text* of § 5 does not reach changes required by the type of court decisions at issue here, where the court is merely conducting a wholly *Marbury* interpretation of a statute and a state constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[9] The text applies only to practices different from those in force or effect on the coverage date, says nothing at all of court decisions, and expressly provides that preclearance does not "bar a subsequent action to enjoin enforcement of" a precleared practice. Thus, a statute or practice "'*that satisfies § 5* still may be enjoined as unconstitutional.'" *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 339 (2000) (quoting *Shaw v. Reno*, 509 U.S. 630 (1993)) (emphasis added in *Reno*).

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[9] One difference between *Kennedy* and this case – but one that ultimately does not matter – is that in *Kennedy*, the district court expressly required preclearance of the Alabama Supreme Court decisions. *Kennedy v. Riley*, 445 F.Supp. 2d 1333 (M.D. Ala. 2006) (three-judge court). Here, the district court required preclearance of the Governor's appointment made pursuant to those decisions. *Plump v. Riley*, ___ F.Supp.2d ___, 2008 WL 192826 (M.D. Ala. Jan. 22, 2008) (Three-judge court), reprinted at Appendix 1a. That distinction, which is really one of semantics, does not change the fact that the practice is the result of a court decision that simply interpreted the State Constitution on race-neutral grounds having nothing to do with voting, and not the policy choice of the legislative or executive branches. Nor does the "difference" lessen the federalism costs of the district court's decision, discussed below. Whether it is the state court decisions themselves that must be precleared or the appointment made pursuant to those decisions, the practical effect is that a decision of the state's highest court, interpreting the state's constitution, is ineffective unless blessed by the federal government.

B. Legislative History. Nor does the purpose or legislative history of § 5 require a holding that § 5 reaches interpretive court decisions. Section 5 was enacted to freeze voting practices and to stop the "cat and mouse" game played by legislators and executives, where they passed new discriminatory laws as soon as the old ones were struck down.[10] There is no similar indication that Congress was targeting interpretative judicial decisions. Of course, there may be some court judgments that fairly should be characterized as legislative acts – redistricting, for example – and those decisions arguably should come under the § 5 umbrella. However, a court normally is not capable of the agile gamesmanship targeted by § 5, and was not in this case.

C. Supreme Court Precedent. This Court's decisions are not to the contrary. In *Kennedy*, the Appellees cited *Branch v. Smith*, 538 U.S. 254 (2003), and *Hathorn v. Lovorn*, 457 U.S. 255 (1982), for the argument that § 5 reaches all changes required by court decisions. That is not what those cases stand for.

Branch involved a Mississippi chancery court decree reapportioning congressional districts. 538 U.S. 259-60. Drawing districts is a legislative act and is hardly the bread and butter of a judge's work. It certainly is not like the court decisions at issue here, which merely interpreted a statute and a provision of the state constitution on neutral, non-racial terms. At most, *Branch* stands for the

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[10] *See e.g. South Carolina v. Katzenbach*, 383 U.S. 301, 313-14, 335 (1966); *Beer v. United States*, 425 U.S. 130, 140 (1976); H.R. Rep. No. 94-196, at 57-58 (1975); 111 Cong. Rec. 10,727 (1965) (Sen. Tydings).

proposition that *some* practices required by court decisions are subject to § 5. Governor Riley does not argue with that proposition here.

Hathorn involved a 1964 Mississippi election statute that, as a result of doubts about its constitutionality, had never been enforced. 457 U.S. 257-58. The Mississippi Supreme Court ordered compliance with a voting practice that predated the coverage date, *id.* at 259-61, but that was not "in force or effect" on November 1, 1964. Because it had never been enforced, the voting practice was not a baseline practice. That is very different from this case, where the practice at issue *was* in force or effect on the coverage date.

D. An Unconstitutional Statute Cannot Serve as the Baseline. In concluding that the Governor's appointment – made pursuant to *Stokes v. Noonan* and *Riley v. Kennedy* – required preclearance, the three-judge court essentially held that the validity of a state law is irrelevant and that Alabama must continue to enforce a statute that is unconstitutional. That conclusion is offensive to federalism and is inconsistent with this Court's decision in *Abrams v. Johnson*, 521 U.S. 74 (1997). *Abrams* demonstrates that both validity and enforceability are required.

In the post-1990 redistricting cycle, the Georgia Legislature passed two redistricting plans that were not precleared and a third that was held to be the product of an unconstitutional racial gerrymander in *Miller v. Johnson*, 515 U.S. 900 (1995). Ultimately, the federal courts drew a plan, and this Court considered a variety of challenges to that remedial plan, including a Section 5 challenge, in *Abrams*. With respect to that Section 5 challenge, this Court said that that the unconstitutional plan,

"constitutional defects and all," could not be the benchmark because "Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." 521 U.S. at 97. Indeed, it could not be used as the benchmark even though elections had been conducted under it.

The Alabama Supreme Court's declaration in *Stokes v. Noonan* (that local laws such as Act No. 77-784 are unconstitutional) operates just like this Court's decision in *Miller v. Johnson*. Under Alabama law, acts that have been declared unconstitutional are void *ab initio*. *Ex parte Southern Railway*, 556 So. 2d 1082, 1089-90 (Ala. 1989). Allowing the preclearance of Act No 77-784 to freeze it in place (if the new practice is not precleared) forces the State to follow an unconstitutional law. And, the fact that an election was conducted under it should have no more effect than the legislative elections in Georgia conducted under the unconstitutional plan.

Perkins v. Matthews, 400 U.S. 379 (1971), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), are not to the contrary. Those decisions, at least at first blush, appear to hold that a practice that violates state law can nonetheless serve as a baseline. However, the key question in both decisions was what voting practices were "in force or effect" on the applicable *coverage date*. In *Perkins*, the city of Canton, Mississippi had elected aldermen by wards, despite an existing statute requiring at-large voting. 400 U.S. at 394-95. In *Lockhart*, the City of Lockhart, Texas had used numbered posts to elect commissioners despite uncertainty about its authority under state law to do so. 460 U.S. at 132-33. The question was whether the coverage date

practice, although arguably illegal, was nonetheless part of the baseline. This Court applied the text of § 5 and held that so long as the practice was actually "in force or effect on" the applicable coverage date – *i.e.*, so long as it was actually being used on that date – then it fixed the statutory baseline and the jurisdiction could not change it without preclearance. *See Lockhart*, 460 U.S. at 132-33; *Perkins*, 400 U.S. at 394-95. That is a far cry from holding that an unconstitutional state practice that was *not* in force or effect on the coverage date can become the new baseline even if that practice violates the state constitution.

The holdings of *Perkins* and *Lockhart* square with the text of § 5, because those cases dealt with coverage-date practices. The holdings also make sense in historical context. Congress had reason to freeze the legal landscape as of the coverage date, including arguably illegal practices, when its goal was to stop a moving target. That logic does not bear out here, where the illegal practice (special elections) was not enacted until long after the coverage date.

Moreover, neither *Perkins* nor *Lockhart* includes an element present in this case: an authoritative determination of state law. The *Lockhart* Court emphasized that the lawfulness of the numbered-post practice at issue in that decision was "not entirely clear" and that, in fact, "[t]here did not appear to be any Texas case law on the subject." *Lockhart*, 460 U.S. at 132 & n.6. In *Perkins*, the legality of the coverage-date practice may not have been as uncertain as in *Lockhart*, but still there was nothing so clear as *Stokes v. Noonan* declaring the practice illegal. Certainly that case did not require, as the district court's interpretation here, "state

courts [to] live with the insult that their judgments can be revised by a federal agency." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 513 (2004) (Kennedy, J., dissenting).[11]

II. The district court's conclusion that the decisions in *Stokes v. Noonan* and *Riley v. Kennedy* require preclearance raises serious constitutional and workability concerns.

As noted above, the three-judge federal district court applied the test in *City of Lockhart*, and did not address the constitutional and workability problems its ruling creates. With its refusal to preclear *Stokes v. Noonan* and *Riley v. Kennedy* in the federal *Kennedy* litigation, USDOJ forced Alabama to keep in place a state statute the violates Alabama's constitution. Assuming USDOJ will make the same

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[11] In *Kennedy*, Governor Riley cited *Young v. Fordice*, 520 U.S. 273 (1997), where this Court held that a plan was not the baseline when it was used for only a short period of time with the anticipation that the Legislature would adopt it, and its use was abandoned "as soon as its unlawfulness became apparent." *Id.* at 283. That argument, Governor Riley has contended, should control in the *Kennedy* context, where the practice of special elections was used briefly in Mobile County solely as a result of the vagaries of the litigation process. Here, the local law was passed in 1977, used briefly in 1982 to fill two back-to-back vacancies, and abandoned at the next vacancy in 2001, the first vacancy after the unlawfulness of the 1977 local law became apparent (with the 1988 *Stokes v. Noonan* decision). Due to the passage of time, *Young* may not have the same force here that it has in *Kennedy*. Still, the Jefferson County election practice was used only briefly and was abandoned at the first opportunity once its unlawfulness became apparent.

decision here and refuse to preclear the Governor's appointment, the result is the same.

As this Court has held, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)); see also *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress lacks power to condition statehood on specific location of state capital). If Congress cannot tell a state what its law is, neither can USDOJ.

As to workability, in the ordinary course of the State's business, it reviews and submits legislation affecting voting for preclearance as soon as it can. The district court's interpretation of § 5 suggests that state officials should not seek preclearance of legislation before its constitutionality is tested, or else an unconstitutional practice may be frozen in place. Practically, though, that is not a reasonable option. The submission and preclearance 60 days later can be completed well before litigation challenging the constitutionality of the legislation in question can be concluded, or even initiated. Moreover, a lawsuit testing the constitutionality of a statute may not be ripe before the preclearance process is completed.

Finally, the State notes that it has done nothing that would merit an interpretation that increases the federalism costs and workability concerns of § 5. There is no evidence that gubernatorial appointments are being used in a discriminatory manner. When the Supreme Court of Alabama declared local Act No. 85-237 unconstitutional in

1988, then-Governor Guy Hunt, a white Republican, appointed Mr. Sam Jones, the African-American who had won the special election, to fill the vacancy on the Mobile County election. When the Supreme Court of Alabama held that Act No. 2004-455 did not revive local Act No. 85-237, Governor Riley, a white Republican, appointed Mr. Juan Chastang, an African-American, to fill the vacancy. And on the Jefferson County vacancy, Governor Riley appointed General George F. Bowman, also an African American.

As this Court has recognized, § 5's preclearance mechanism is "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). The district court's interpretation of § 5 in this case (and in *Kennedy*) greatly exacerbates that federalism cost by requiring the state to keep in place an unconstitutional statute, by precluding enforcement of an interpretation of the state constitution by the state Supreme Court, and by encouraging states not to seek preclearance of a practice (and thus freeze it into place) until the constitutionality of that practice has been tested. An interpretation that magnifies the already-high federalism costs of § 5 should not be allowed without a clear statement from Congress. *See Raygor v. Regents of the Univ. of Minn.* 534 U.S. 533, 543-44 (2002). Section 5 does not contain a clear statement that *Marbury*-style court decisions or post-coverage date practices are subject to § 5, or

that an unconstitutional state law can be frozen into place.[12]

III. The practice of gubernatorial appointment is not subject to § 5's preclearance requirement because it was the State's practice on Alabama's § 5 coverage date of November 1, 1964.

By the clearest of terms, § 5 applies only to voting practices that are different from those in effect on a covered jurisdiction's coverage date, which in Alabama's case is November 1, 1964:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting *different from that in force or effect on November 1, 1964*, ... [such practice is unenforceable unless precleared.]

42 U.S.C. § 1973c(a) (emphasis added).

Here, the practice of filling vacancies on the Jefferson County Commission on November 1, 1964 was gubernatorial appointment. *See* Code of Alabama (1940), T. 12, § 6. The practice the Governor seeks to enforce today – and which under

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[12] As in *Riley v. Kennedy*, No. 07-77, Governor Riley does not argue that § 5 is unconstitutional. He only asks this Court to be cognizant of the constitutional limitations upon that statute as it answers the interpretative question presented in this appeal.

state law he must enforce – is likewise gubernatorial appointment. Thus, the text of § 5 does not reach the appointment at all.

As clear as the text is, USDOJ has nonetheless interpreted § 5 to apply as a one-way ratchet, meaning each new practice must be compared to the preceding practice, even if the preceding practice was enacted after the coverage date. A Department regulation states that "[a]ny change affecting voting, even though it . . . returns to a prior practice or procedure, . . . must meet the Section 5 preclearance requirement." 28 C.F.R. § 51.12. Language in the Federal Register indicates that § 51.12 was intended to clarify that § 5 covers a "voting change that returns a jurisdiction to a practice that was previously in effect (*e.g.*, to that in use on November 1, 1964)." 52 Fed. Reg. 486, 488 (1987).

The Department's interpretation of the Voting Rights Act is due deference. *See NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985). However,

> the principle has its limits. Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.

Presley v. Etowah County Comm'n, 502 U.S. 491, 508 (1992). Here, Congress could not have been clearer in expressing its intent. In fact, it is difficult to imagine anything less ambiguous than a single date in time. Therefore the regulation is counter to the text and is not due deference.

This Court has twice suggested, in dicta, that § 5 picks up intervening changes as the baseline practice. In *Presley*, 502 U.S. 491, this Court considered whether a change in the powers of an elected office was a change with respect to voting, and concluded that it was not. *Id.* at 509. While summarizing the requirements of § 5, this Court said as follows:

> To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.

502 U.S. at 495. That was not the *holding* of *Presley*, nor was the issue of choosing a baseline practice before the Court. The district court nonetheless cited this language from *Presley*. Memorandum Opinion at Appendix 5a n.1.

The *Presley* language was repeated in *Young v. Fordice*, 520 U.S. 273, 281-282 (1997), in which this Court determined that a practice from the 1990's was the baseline practice. However, this Court noted that "none of the parties asks us to look further back in time than 1994 . . . ." *Id.* at 282. Again, the "intervening changes" language is *dicta*, and the Court was not asked in *Young* to decide whether post-coverage-date changes can become the baseline. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545-46 (2005) (the repetition of a formula in *dicta*, and that merely assumes the formula's validity, is not entitled to the weight of *stare decisis*).

This straight-forward reading of the statute (that it covers only practices different from those in effect on the coverage date) is consistent with the purpose of § 5. Section 5 was Congress' targeted "response to [the] common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976). Its purpose was to freeze voting practices in covered jurisdictions at a date in time to prevent a "cat and mouse" game. 111 Cong. Rec. 10,727 (1965) (Sen. Tydings).

It makes sense, then, that Congress required preclearance of any practice different than the one in place on a date certain, not any practice different than the one before. The goal of § 5 was not to require covered jurisdictions to pass continually progressive laws, however noble a goal that may be. The goal was to call a "time out" and to stop the gamesmanship. To call that "time out," Congress chose a specific date, and has continued to use that same date in subsequent extensions of § 5.[13]

This reading is consistent, too, with the Act's coverage criteria: Pursuant to 42 U.S.C. § 1973b(b), a jurisdiction is covered if it met certain criteria of being discriminatory *on the coverage date*. That was true in the original enactment and every subsequent

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[13] Section 5 was originally effective for five years, and was extended in 1970 for 5 years, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315; in 1975 for 7 years, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400; in 1982 for 25 years, Pub. L. No. 97-205, § 2(b)(4), 96 Stat. 131, 133; and in 2006 for another 25 years, Pub. L. No. 109-245, § 7, 120 Stat. 577, 581. Each reenactment continues to use the same dates for both coverage criteria and the baseline practice.

extension of § 5. Thus, to decide whether Alabama was covered by the 2006 extension, one looks back to November 1, 1964. Likewise, to decide whether a practice must be precleared, one compares it to the practice in effect on that same date.

This reading of the statute would *not* remove all checks against discriminatory practices. Returning to a coverage-date practice is hardly a typical scenario, but if it happens, and if that practice discriminated against minority voters, it would remain subject to § 2 of the Voting Rights Act and other statutory and constitutional voting rights protections.

No one could dispute that if Alabama continued to maintain the precise set of voting practices in place on November 1, 1964, no matter how flawed they may be, then § 5 would never come into play. Any of those practices would, however, be subject to § 2. It is evident, then, that § 5 is not about the substance of the law (that is the job of § 2). It is not about a forced evolution of the law. Section 5, instead, is about stopping quick changes, and Congress did so by picking a single day in history to serve as the benchmark.

The district court therefore should not have compared the practice of gubernatorial appointment to a practice enacted in 1977. Instead, the district court should have compared the current practice of gubernatorial appointment with the November 1, 1964 practice – also gubernatorial appointment – and concluded that there was no "change" requiring preclearance.

Even if this Court does not use this occasion to decide whether intervening changes can become the

§ 5 baseline, this textual analysis supports the Governor's previous arguments, discussed above in Sections I and II, that a practice mandated by state court decisions, where the state court is merely exercising *Marbury*-style review, is not subject to § 5. The interpretation adopted by the district court here (and in *Kennedy v. Riley*) so exacerbates the federalism costs already inherent in § 5, it should not be adopted unless there is a clear statement in the text that the statute reaches such practices. This discussion shows that the text cannot provide that clear indication with respect to *Stokes v. Noonan* and *Riley v. Kennedy*, which reaffirmed the practice (gubernatorial appointment) in place "on November 1, 1964." Nor does it provide such a clear indication with respect to an appointment required by those decisions.[14]

IV. The district court erred by entering final judgment after briefing and oral argument on a motion for preliminary injunction and without giving notice required by Fed.R.Civ.P. 65(a)(2).

At the time the district court entered its judgment, all that was before it was a motion for preliminary injunction. The hearing notices referenced that fact, *see* Appendix 19a, 21a, and the district court never indicated that it intended to jump to the merits. The district court thereby denied Governor Riley the opportunity to argue the standards that apply to a hearing on the merits.

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[14] *See Riley v. Kennedy*, No. 07-77, Bl. Br. 26-27; Yellow Br. 7-8.

This Court has noted the many differences between a hearing on a preliminary injunction and one on the merits:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. In light of these considerations, *it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.*
>
> Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." *Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the hearing and the trial] either before the hearing commences or at a time which will still afford*

> *the parties a full opportunity to present their respective cases."*

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (emphasis added; citations omitted).

The lack of notice matters here, as Governor Riley briefed and argued the standards applicable to a motion for preliminary injunction. Moreover, to the extent factual questions concerning the implementation of the local act are relevant, those questions were still under investigation when the district court entered its judgment. For instance, in this case it was not known until the hearing before the district court that there had been special elections in 1982 under Act No. 77-784. Moreover, it was not known until *after* the district court's judgment that those special elections were not specifically precleared.[15]

Pursuant to Rule 65(a)(2), Governor Riley was entitled to notice of what questions the district court would consider and what standards would apply. Granted, if this Court decides the substantive § 5 questions in Governor Riley's favor, then the notice question need not be reached. If it is reached, then

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[15] The fact that the two special elections were not specifically precleared was included in the record of the state court litigation (which began after the district court issued its judgment), but does not appear in the record in this case. It is discussed here only to demonstrate that the facts were not fully known at the time that the district court skipped to the merits, and this fact is among those that the Governor would have investigated further had the proceedings not been abbreviated without notice. As best we can tell at this time, at least one of the 1982 special elections was held on a discretionary date and should have been precleared.

the judgment of the district court is due to be reversed on this ground.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's judgment and remand the case with instructions to declare that neither the Alabama Supreme Court decisions at issue, nor a gubernatorial appointment made pursuant to those decisions, must be precleared. Should this Court rule in *Riley v. Kennedy* before this case is decided, and if it is on grounds that apply to this case, it may be appropriate to vacate and remand with instructions to reconsider this case in light of that decision.

Respectfully submitted,

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May 21, 2008

Appendix

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
v.	)	2:07cv1014-MEF
	)	(WO)
HONORABLE BOB	)	
RILEY, as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

MEMORANDUM OPINION

Per curiam:

I. FACTS AND PROCEDURAL HISTORY

This three-judge court has been convened to consider the claim of Fred L. Plump that, under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, the State of Alabama was required, but failed, to preclear Defendant Governor Bob Riley's authority to appoint a person to a vacancy on the Jefferson County Commission. The Plaintiff has asked the court to enter a declaratory judgment that Defendant Governor Riley's authority to appoint a

person to fill a vacancy on the Jefferson County Commission must be precleared. The Plaintiff has further asked the court to enjoin the appointment by the Defendant of General George F. Bowman to the Jefferson County Commission, and to enjoin the Defendant from interfering with the election to fill the vacancy in the District 1 seat on the Jefferson County Commission which is scheduled for February 5, 2008. For the reasons to be discussed below, we find that the Plaintiff is entitled to only declaratory relief.

This case is being decided against the backdrop of a similar case arising out of a different county in Alabama. In *Kennedy v. Riley,* 2:05cv1100-MHT (M.D. Ala.) (three-judge court), a separate three-judge court recently was asked to vacate the gubernatorial appointment of a person to a vacancy on the Mobile County Commission. The three-judge court in that case granted the plaintiffs' requested relief, finding that the appointment had been made pursuant to decisions by the Alabama Supreme Court which constituted changes in procedure which had not been precleared and, therefore, violated the Voting Rights Act. *See Kennedy v. Riley,* 445 F. Supp. 2d 1333 (M.D. Ala. 2006) (three-judge court).

The facts of the instant case are substantially similar to those of the *Kennedy* case. The beginning point in both cases is an Alabama statute of general application which provides that a vacancy in a county commission shall be filled by appointment by the Governor. *See Alabama Code* § 11-3-6. Subsequent to the passage of that statute, local laws were passed by the Alabama legislature and precleared by the U.S. Attorney General which provided that in certain circumstances special

elections would be held to fill vacancies on the county commissions in both Mobile and Jefferson County. In Jefferson County, that Act was No. 77-784, while in Mobile County, it was Act No. 85-237.

At the evidentiary hearing held in this case on January 15, 2008, the Plaintiff adequately established that in 1982 two vacancies on the Jefferson County Commission were filled by special election pursuant to the selection process outlined in Act No. 77-784. Similarly, an election was held in 1987 pursuant to Act No. 85-237 to fill a vacancy on the Mobile County Commission.

In *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), the Alabama Supreme Court held that, because Act No. 85-237, which applied in Mobile County, was a local statute and because it conflicted with and was subsumed by another state law of general application, it violated the Alabama Constitution. The State did not submit *Stokes* for preclearance.

In 2001, a vacancy on the Jefferson County Commission was filled by appointment by then-Governor Siegelman rather than by special election, presumably because of *Stokes*.

In 2004, the Alabama Legislature passed Act No. 2004-455, amending Ala. Code § 11-3-6 expressly to allow local laws to make exceptions to the general rule of filling vacancies by gubernatorial appointments. The U.S. Attorney General precleared Act No. 2004-455.

In *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005), the Alabama Supreme Court rejected claims that Act No. 2004-455 revived Act No. 85-237 and held that Act No. 2004-455 applied only prospectively. Relying

on *Riley* and *Stokes*, the Governor made an appointment to the vacated position on the Mobile County Commission. As with *Stokes*, the State did not submit *Riley* for preclearance.

A group of plaintiffs then filed a lawsuit in federal court claiming that the appointment by the Governor pursuant to *Riley* and the earlier decision in *Stokes* could not be enforced without first being precleared. The three-judge court agreed. *Kennedy*, 445 F. Supp. 2d at 1334.

In November 2006, the Governor submitted the *Stokes* and *Riley* decisions for preclearance, but the U.S. Attorney General did not preclear the decisions. The three-judge court case, *Kennedy*, was appealed to the U.S. Supreme Court and is currently pending on appeal.

On October 29, 2007, following the election of County Commissioner Larry Langford as Mayor of the City of Birmingham, the Jefferson County Election Commission ordered a special election to be held on February 5, 2008 to fill the vacancy which would exist on the Commission upon the assumption by Commissioner Langford of the office of Mayor.

On November 13, 2007, the vacancy was created when Commissioner Langford assumed the office of Mayor. On November 16, 2007, the Plaintiff, who has qualified to run for the vacant office in the February 5, 2008 special election, filed the instant case. On November 21, 2007, Governor Riley appointed General Bowman to fill the vacancy on the Jefferson County Commission.

II. DISCUSSION

A. Plaintiff's Request for Declaratory Judgment

The Plaintiff urges this court to conclude, based largely on *Kennedy*, that Defendant Governor Riley's power to appoint persons to fill vacancies on the Jefferson County Commission is a change in procedure which has not been precleared.

Section 5 of the Voting Rights Act provides that a covered jurisdiction, such as Alabama, "may not implement any change in a voting 'qualification, prerequisite, standard, practice, or procedure' unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting 42 U.S.C. § 1973c).

In determining § 5 issues, a court must consider (i) whether there are voting qualifications, prerequisites, standards, practices, or procedures that are different from "those in existence before they were adopted," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992)-that is, whether a change was covered by § 5,[1] (ii) if the change was

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1. The court in *Presley* explained this inquiry to mean that it is only "[a]bsent relevant intervening changes, [that] the Act requires" comparison with practices in existence on November 1, 1964. *Presley*, 502 U.S. at 495; *see also Lake v. State Bd. of Elections of N. C.*, 798 F. Supp. 1199, 1205 (M.D. N.C. 1992) (three-judge court); *Villegas v. Dallas Indep. Sch. Dist.*, No. 30cv858R, 2003 WL 22573921, at *5 & n. 9 (N.D. Tex. Oct. 17, 2003) (citing *Presley* and stating the inquiry is whether the practice is "different from the one in force on the date § 5 took effect or (if applicable) different from the one that earlier received preclearance?"); *cf. NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 677 (N.D. Ga. 1980) (three-judge

covered, whether § 5's approval requirements are satisfied, and (iii) if the requirements are not satisfied, what remedy is appropriate. *City of Lockhart v. United States*, 460 U.S. 125, 129 n. 3 (1983).

As stated above, the three-judge court in *Kennedy* reasoned that because Act No. 85-237, which provided for special elections in Mobile County, established a precleared practice which was put into force and effect with the holding of a special election in 1987, it was the baseline to use in determining whether gubernatorial appointment was a change requiring preclearance. *Kennedy*, 445 F. Supp. 2d at 1336. Because *Stokes* invalidated Act No. 85-237 and the *Riley* court refused to revive Act No. 85-237, the two decisions constituted changes in existing, precleared practice or procedure with respect to voting that should have been precleared before they were implemented. *Id.*

We are persuaded to follow the reasoning of *Kennedy* in this case. Of course, this case is not identical to *Kennedy*. In particular, the Plaintiff does not concede that *Stokes* invalidated Act No. 77-784, which applies only to Jefferson County, since *Stokes* was decided with respect to a Mobile County local law. That is a question of purely state law not before this court. We are required to determine the baseline "without regard for [its] legality under state law."

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court) (rejecting interpretation of Voting Rights Act where "a covered state or subdivision thereof could amend its laws concerning voting and receive the Attorney General's approval, then change its laws back to the way they were before, avoiding federal preclearance...").

Lockhart, 460 U.S. at 132-33 (relying on *Perkins v. Matthews*, 400 U.S. 379, 394-95 (1971)).[2]

The practice of special election in Jefferson County was established by Act No. 77-784 and was precleared. That practice was used, or put into force and effect, when special elections were held pursuant to that Act in 1982.[3] The gubernatorial appointment power exercised thereafter was, therefore, a change in practice covered under the Voting Rights Act which must be precleared.

The court emphasizes that whether Act No. 77-784 is, in fact, unconstitutional under state law, and whether positions on the Jefferson County Commission must be filled by special election or

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2. In *Kennedy*, the claim was raised that the *Stokes* and *Riley* decisions had to be precleared. Of course, the Alabama Supreme Court does not have to preclear any of its interpretations of state law; it is the final word on what state law is. It was rather the power of gubernatorial appointment which was exercised in good faith by the Defendant and which was authorized by state law which had to be precleared for purposes of the Voting Rights Act because it constituted a change in practice under federal law. In this case, as in *Kennedy*, it is the practice of gubernatorial appointment which has been challenged as constituting a change from the precleared practice of special election to fill vacancies.

3. The court does not agree with the characterization by the Defendant of this practice having been abandoned within the meaning of *Young v. Fordice*, 520 U.S. 273 (1997). In *Young*, the Court reasoned that the state officials abandoned the state law practice just as soon as it became clear that it would not be enacted by the state legislature, and the practice was only in effect for a short period of time. *See Young*, 520 U.S. at 282-83. Here, the practice of special election was enacted in 1977, used in 1982, and, assuming arguably that it was invalidated, not invalidated until 1988.

gubernatorial appointment under state law, are questions we do not reach and this opinion should not be understood in any way as reaching. We conclude only that the authority of the Governor to appoint persons to fill vacancies on the Jefferson County Commission is a change in practice which must be precleared, and that the Plaintiff is entitled to declaratory relief to that effect.[4]

B. Plaintiff's Request for a Preliminary Injunction

This court acknowledges that, generally speaking, if changes in voting practice subject to § 5 have not been precleared, a plaintiff is entitled to an injunction prohibiting the implementation of those changed practices. *Clark v. Roemer,* 500 U.S. 646, 653 (1991). In this case, however, the change has already been implemented, so enjoining the Defendant from making the appointment is not an appropriate form of relief. Similarly, although the Plaintiff asks this court to enjoin the Defendant from interfering with the election to be held on February 5, 2008, the determination by this court that the exercise of gubernatorial appointment power is a change which must be precleared under the Voting Rights Act does not give this court authority to prevent the Defendant from challenging, on state law

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4. In the Amended Complaint the Plaintiff also seeks a declaratory judgment that the Election Commission of Jefferson County has the authority to call a special election for District 1 of the Jefferson County Commission. That determination is outside of the province of this three-judge court. There is no claim before the court to determine the status of any authority pursuant to which such election might be held for purposes of the Voting Rights Act, and the validity of such an election under state law is not before this court.

grounds, the validity of the election. Therefore, this court concludes that the Plaintiff's requested preliminary and permanent injunctions are due to be denied.

C. Form of Relief

The next remedial issue before the court, therefore, is whether this court should order the seat on the Jefferson County Commission vacated at this time, or whether the court should give the Defendant the opportunity to seek preclearance of the gubernatorial appointment power. As noted above, this case involves a situation where the changed practice has already been implemented. The Supreme Court has determined that where a practice has already been implemented, it might be appropriate for a district court "to afford local officials an opportunity to seek federal approval before" ordering relief. *Lopez v. Monterey County, Cal.*, 519 U.S. 9, 20-21 (1996) (citing *Perkins v. Matthews*, 400 U.S. 379 (1971); *Berry v. Doles*, 438 U.S. 190 (1978) (per curiam)). Under that authority, this court determines that the proper course of action is for this court to allow the Defendant time in which to either (1) seek preclearance under the Voting Rights Act of the authority of the Defendant to fill a vacancy on the Jefferson County Commission by appointment, or (2) advise the court that he intends to appeal this decision. Should preclearance not be obtained to validate the gubernatorial appointment of General George F. Bowman to the Jefferson County Commission, the necessity for preclearance dictates that the appointee must be removed, as he would be serving as a Commissioner of Jefferson County in violation of federal law.

This court being mindful that the substantially-similar *Kennedy* decision is currently pending before the U.S. Supreme Court, the court will enter final judgment in this case to allow for a prompt appeal, if that is desired, and for the possibility of consolidation on appeal of this case with *Kennedy*, should the U.S. Supreme Court wish to consider the two cases together.

Accordingly, it is hereby ORDERED as follows:

1. The Plaintiff's request for declaratory judgment is GRANTED and this court declares that Governor Riley's authority to appoint a person to fill a vacancy on the Jefferson County Commission must be precleared.

2. The Plaintiff's request for injunctive relief is DENIED.

___3. The Defendant is given until February 5, 2008 to file with the court a notice that he either intends to appeal or intends to seek preclearance. In the event that the Defendant does not notify the court on or before February 5, 2008 that he intends to seek preclearance, the seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court. If the Defendant notifies the court on or before February 5, 2008 that he intends to seek preclearance, he will be given a total of 90 days to obtain preclearance. If preclearance is not obtained from either the U.S. Attorney General or the U.S. District Court for the District of Columbia within 90 days, then the appointment of General George F. Bowman to the Jefferson County Commission shall be vacated without further order of this court.

An appropriate judgment will be entered.

Done this the 22nd day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07cv1014-MEF
	)	(WO)
HONORABLE BOB	)	
RILEY, as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

JUDGMENT

In accordance with the Memorandum Opinion entered this date, it is the FINAL JUDGMENT of the court that:

(1) Declaratory Judgment is entered in favor of the Plaintiff Fred L. Plump and against Defendant Governor Bob Riley.

(2) The Defendant has 90 days from the date of this order to obtain preclearance in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. In the absence of such notification, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court.

b. If the Defendant chooses to seek preclearance, he shall so notify the court in writing on or before February 5, 2008. In that event, if preclearance is not obtained by 90 days from the date of this Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, 07-77, if the U.S. Supreme Court deems consolidation appropriate.

Done this the22nd day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07cv1014-MEF
	)	(WO)
	)	
HONORABLE BOB RILEY, as Governor of the State ofAlabama	)	
	)	
Defendant.	)	

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

ORDER

Upon consideration of the Plaintiff's Motion to Amend Judgment (Doc. #30), filed on January 23, 2008, and the Defendant's Response, filed on January 24, 2008, and in view of the apparent confusion over the intent of this court's original Judgment, the Motion is ORDERED GRANTED to the limited extent that the court clarifies its previous Judgment as follows:

The Jefferson County Commission seat currently occupied by General George F. Bowman will be vacated without further order of this court on

the following dates and under the following three contingencies:

1. If the Defendant chooses to appeal this court's January 22, 2008 Memorandum Opinion and Judgment, the Defendant shall notify the court on or before February 5, 2008 of that decision and the seat will be vacated on February 5, 2008 without further order of the court.

2. If the Defendant notifies the court on or before February 5, 2008 that he chooses to seek preclearance, then the seat will be vacated only if preclearance is not obtained by 90 days from the date of this court's January 22, 2008 Memorandum Opinion and Judgment.

3. If the Defendant fails to notify the court on or before February 5, 2008 of which action he chooses to take, the seat will be vacated on February 5, 2008.

All other provisions of the original Judgment shall remain unchanged.

An appropriate Amended Judgment will be entered.

DONE this 25th day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)
	)
Plaintiff,	)
	) CASE NO.
v.	) 2:07cv1014-MEF
	) (WO)
HONORABLE BOB	)
RILEY, as Governor of	)
the State ofAlabama,	)
	)
	)
Defendant.	)

Before Rosemary Barkett, Circuit Judge, Mark E. Fuller, Chief District Judge, and W. Harold Albritton, District Judge.

AMENDED JUDGMENT

In accordance with the Memorandum Opinion entered on January 22, 2008, it is the FINAL JUDGMENT of the court that:

(1) Declaratory Judgment is entered in favor of the Plaintiff Fred L. Plump and against Defendant Governor Bob Riley.

(2) The Defendant has 90 days from the date of the original Judgment, January 22, 2008, to obtain preclearance in accordance with § 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. If the Defendant notifies the court on or before February 5, 2008 that he intends to appeal, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.

b. If the Defendant chooses to seek preclearance, he shall so notify the court in writing on or before February 5, 2008. In that event, if preclearance is not obtained by 90 days from the date of the original Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated 90 days from January 22, 2008 without further order of this court.

c. If the Defendant does not notify the court on or before February 5, 2008 which action he chooses to take, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on February 5, 2008 without further order of this court.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure so that appeal may be taken and the case consolidated with *Kennedy v. Riley*, 07-77, if the U.S. Supreme Court deems consolidation appropriate.

Done this the 25th day of January, 2008.

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07-cv-01014-MEF
HONORABLE BOB,	)	
RILEY as Governor of	)	
The State of Alabama,	)	
	)	
Defendant.	)	

ORDER

Upon consideration of the Motion for Preliminary Injunction (Doc # 6), it is hereby ORDERED as follows:

(1) Oral argument on the motion is set for January 15, 2008, at 10:00 a.m., in Courtroom 2F of the United States Courthouse, One Church Street, Montgomery, Alabama 36104.

(2) Defendants shall submit a response on or before December 28, 2007.

(3) Plaintiffs shall submit a reply on or before January 4, 2008.

(4) The Parties shall submit all stipulations of law and fact and agreed statements of fact on or before January 4, 2008.

Done on this the 18th day of December, 2007.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	2:07-cv-01014-MEF
HONORABLE BOB,	)	
RILEY as Governor of	)	
the State of Alabama,	)	
	)	
Defendant.	)	

ORDER

It is hereby ORDERED that oral argument on the plaintiff's Motion for Preliminary Injunction set for January 15, 2008 at 10:00 A.M. is rescheduled for **January 15, 2008 at 9:00 A.M. (CST).**

DONE this the 10th day of January, 2008.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	2:07-cv-01014-MEF-CSC
	)	
HONORABLE BOB RILEY, as Governor of the State of Alabama	)	
	)	
Defendant.	)	

Plaintiff's Motion to Amend Judgment (Doc. 29)

1. The Judgment (Doc. 29) appears to differ from the Order portion of the Court's Memorandum Opinion (Doc. 28).

2. It appears that the Memorandum Opinion (Doc. 28, page 9) intended to extend General George F. Bowman's term beyond 5 February 2008 only if the defendant gave notice that he was seeking preclearance.

3. The Judgment states in paragraph (2)a, "If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. *In the absence of such notification*, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of

this court" (emphasis added).

4. Plaintiff understood the Memorandum opinion to vacate General Bowman's term if Governor Riley does *not* seek preclearance, but the highlighted words do the opposite.

5. For these reasons, the plaintiff prays that the Court amend Paragraph (2)a of its Judgment to read as follows

> a. If the Defendant chooses not to seek preclearance, but instead to immediately appeal this Judgment, the Defendant shall so notify this court in writing on or before February 5, 2008. *If such notice is filed*, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on *February 5, 2008*, without further order of this court.

Submitted by,

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[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
	)	
BOB RILEY, Governor,	)	
	)	
Defendant.	)	

DEFENDANT GOVERNOR BOB RILEY'S RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND

Defendant, Governor Bob Riley, respectfully responds as follows to the Plaintiff's Motion to Alter Judgment (doc. 30):

1. As counsel for plaintiff has pointed out in a motion filed yesterday, there appears to be some inconsistency between this Court's opinion (Doc. 28) and judgment (Doc. 29) concerning General Bowman's right to remain in office pending the resolution of preclearance and/or appellate proceedings. While the parties agree that there is an apparent inconsistency in the opinion and judgment, the parties have vastly different understandings of what this Court intended with respect to General Bowman remaining in office. Governor Riley understood the Court's *judgment* (which has priority in any event) to accurately reflect the Court's

intention – namely, that General Bowman is entitled to remain in office pending the resolution of either preclearance or appellate proceedings. (Judgment at 2, ¶ (2)(a)). If this Court clarifies the documents, Governor Riley respectfully requests the Court to amend its opinion (Mem. Op. at 9, ¶ 3) to reflect that intent.

2. In addition to the issues raised in the Plaintiff's motion, there are other apparent inconsistencies or ambiguities in this Court's opinion and judgment. It is not clear at this time whether the Court in fact granted or denied the Plaintiff's request for injunctive relief or whether the judgment is one from which an appeal can be taken:

a) Although the Court's opinion and judgment indicate that the Court meant to dispose of the entire case, the Court's disposition of plaintiff's § 5 claim leaves pending several other claims for relief. Plaintiff alleged that General Bowman's appointment violated "the Constitution and laws of the United States." Complaint ¶ 27. And on that basis plaintiff requested a declaratory judgment not only on § 5 grounds, but also on the grounds "that the actions of defendant Riley complained of herein violate his rights protected by § 2 of the Voting Right Acts and the Thirteenth, Fourteenth and Fifteenth Amendments." *Id.* at ¶ 31. It is not clear that this Court's declaratory judgment "that Governor Riley's authority to appoint a person to fill a vacancy on the Jefferson County Commission must be precleared [under § 5]," Mem. Op. at 8, resolves, or even addresses, those separate claims.

b) It is not clear that this Court had the authority to finally adjudicate the merits of

plaintiff's claims for declaratory and permanent injunctive relief at this stage of the litigation. The issue before the Court was plaintiff's motion for a preliminary injunction; the Court's order, however, appears to finally resolve the merits of plaintiff's § 5 claims. It is not clear that proper notice was given concerning any intention to advance the trial on the merits to the hearing on the preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2). "[T]he parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing on the preliminary injunction] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (internal quotation marks omitted). *Accord Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. Sept. 30 1981). Our records reflect that this Court never ordered the trial of the merits to be consolidated with the hearing of plaintiff's motion for a preliminary injunction and, in fact, only instructed the parties to address plaintiff's request for a preliminary injunction. *See, e.g.*, Doc. 16 (scheduling hearing and briefing on "Motion for Preliminary Injunction (Doc. # 6)"); Doc. 23 (rescheduling "oral argument on the plaintiff's Motion for Preliminary Injunction").

c) It is not clear whether this Court's opinion and judgment deny plaintiff's requested preliminary injunctive relief or rather, in effect, grant – albeit contingently – his request for permanent injunctive relief. *Compare* Mem. Op. at 2 ("[W]e find that the Plaintiff is entitled to only declaratory relief.") *and id.* at 7 ("[T]he Court concludes that the Plaintiff's requested preliminary and permanent injunctions

are due to be denied.") *with id.* at 8 (If preclearance is not obtained within 90 days, General Bowman's appointment "shall be vacated *without further order of this court.*" (emphasis added)) and Judgment at 1-2, ¶ (2)(b) (If preclearance is not obtained within 90 days, General Bowman's appointment "shall be vacated on that date *without further order of this court.*" (emphasis added)).

3. The opinion and judgment could be construed to hold that if the State pursues preclearance, the Court intends to vacate General Bowman's appointment after 90 days even if, as is sometimes the case, the preclearance submission is still under active consideration on the 90th day. *See* Mem. Op. at 9, ¶ 3 ("If preclearance is not obtained from either the U.S. Attorney General or the U.S. District Court for the District of Columbia within 90 days, then the appointment of General George F. Bowman to the Jefferson County Commission shall be vacated without further order of this court."); Judgment at 1-2, ¶ (2)(b) ("[I]f preclearance is not obtained by 90 days from the date of this Judgment, the Jefferson County Commission seat currently occupied by General George F. Bowman shall be vacated on that date without further order of this court."). If Governor Riley opts to seek preclearance, he would do so without unnecessary delay. However, a submission would take time to prepare, and the entire process, including DOJ consideration, may take longer than 90 days for reasons outside Governor Riley's control. Governor Riley therefore respectfully requests that the Court clarify its opinion and/or judgment to make clear that, in the event the State pursues preclearance, General Bowman's appointment will not be vacated while the

preclearance submission is under active consideration and that the Court, as in *Kennedy v. Riley*, will revisit the issue of remedy once the preclearance process has concluded. In the event the State pursues preclearance, it will, of course, be pleased (as in *Kennedy*) to make monthly progress reports to the Court concerning the status of preclearance proceedings.

4. This Court's opinion and judgment were crafted so as "to allow for a prompt appeal" by Governor Riley to the U.S. Supreme Court and "for the possibility of consolidation on appeal of this case with *Kennedy*" if that course is "desired" by Governor Riley and ordered by the Supreme Court. Mem. Op. at 8; *accord* Judgment at 2. Governor Riley appreciates this Court's efforts in that respect, but believes it important to point out that consolidation in the Supreme Court at this point, even if desired, would be problematic. The Governor has already filed a nearly 15,000-word merits brief in the Supreme Court in the *Kennedy* litigation, and four separate groups of *amici curiae* filed full-length briefs supporting the Governor's position on January 22. The Kennedy appellees' merits brief is due February 13, only 8 days after this Court's February 5 deadline. The case, in short, is well underway. Consolidation at this late stage would inevitably delay the progress of the *Kennedy* case – at considerable cost to the Court, the litigants, and other interested parties.

If an appeal were taken to the Supreme Court from this Court's decision, the Supreme Court would likely "hold" the appeal and dispose of it summarily – either on the merits or via vacatur for further consideration – upon rendering a decision in

Kennedy. *See, e.g.*, Gressman, Geller *et al.*, *Supreme Court Practice* § 5.19, at 366 n.135 (9th ed. 2007) ("The Court's normal procedure, in appeals as well as certiorari petitions, is to vacate the lower court judgment and remand for reconsideration of intervening authority." (citing cases)).

WHEREFORE, Defendant respectfully requests that this Court deny Plaintiff's Motion to Amend Judgment and clarify its Opinion and Judgment as set forth herein.

Respectfully submitted,

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s/ James W. Davis
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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

GOVERNOR RILEY'S NOTICE IN RESPONSE TO THE MEMORANDUM OPINION AND JUDGMENT OF THE COURT

Governor Bob Riley, defendant in this action, respectfully gives this notice in response to the Court's Memorandum Opinion (doc. # 28) and Judgment (doc. # 29), as amended (*see* doc. # 32 & 33).

1. While Governor Riley respectfully disagrees with this Court's holding that preclearance is required, he intends to seek preclearance of applicable matters related to Governor Riley's appointment of General George Bowman to a vacant seat on the Jefferson County Commission.

2. Governor Riley does not waive any rights or positions by seeking preclearance, including, but not limited to, those specifically set out herein. Governor Riley does not waive his arguments raised previously in this action (and a related action) that

preclearance is not required on the facts of this case. In addition, in the event the applicable authority has not ruled upon the preclearance submission within 90 days of January 22, 2008, Governor Riley reserves the right to request that this Court grant additional time for consideration of the preclearance submission. Moreover, in the event that the appointment is vacated at some point by operation of the Court's Judgment, it is Governor Riley's position that the Judgment will at that time become appealable pursuant to 28 U.S.C. § 1253 and other applicable provisions. Governor Riley reserves all rights of mandamus or appellate review available.

WHEREFORE, Governor Riley respectfully gives notice that he intends to seek preclearance as set forth herein.

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ James W. Davis
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Assistant Attorneys General

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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

GOVERNOR RILEY'S NOTICE OF FILING
PRECLEARANCE SUBMISSION

In conformance with his previously file notice to this Court (doc. 34), Governor Bob Riley, defendant in this action, respectfully gives notice that the attached preclearance submission is being sent to USDOJ today for delivery tomorrow.

Governor Riley does not waive any rights or positions by seeking preclearance, including, but not limited to, those specifically set out herein. Governor Riley does not waive his arguments raised previously in this action (and the related *Kennedy* litigation) that preclearance is not required on the facts of this case. In addition, in the event USDOJ has not ruled upon the preclearance submission by April 21, 2008, Governor Riley reserves the right to request that this Court grant additional time for consideration of the preclearance submission.

Governor Riley reserves all rights of appellate review and/or mandamus.

Due to the file size, the preclearance submission will be attached in two segments. Further, due to the size of the submission, hard copies will be provided to the Court.

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ Misty S. Fairbanks
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Misty S. Fairbanks (FAI005)
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Counsel for the Defendant

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
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FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES
(filed March 22, 2008)

The defendant Bob Riley, in his official capacity as Governor of the State of Alabama, hereby appeals to the Supreme Court of the United States from the *Judgment* entered in this case on January 22, 2008, (doc. 29) and the *Memorandum Opinion* of the same date (doc. 28), as amended by this Court's *Order* of January 25, 2008, (doc. 32) and reduced to an *Amended Judgment* (doc. 33) on the same date. This appeal is intended to be fully inclusive of any and all matters currently, finally resolved by the district court and thereby supporting an appeal.

The United States District Court expressly characterized the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) as final. Governor

Riley has advanced a contrary argument that neither the *Judgment* (doc. 29) nor the *Amended Judgment* (doc.33) is yet a true final judgment, because, *inter alia*, both the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) cause injunctive relief to spring into being next month, if preclearance is not obtained. *See* doc. 34. To prevent a jurisdictional cloud from forming over the present litigation, however, and to secure the fundamental right to appellate review, this notice of appeal is being filed.

In related litigation (*Riley v. Kennedy*, Case No.07-77, United States Supreme Court, pending), the plaintiffs have argued that Governor Riley's failure to appeal from an earlier declaratory judgment of the United States District Court is fatal to his appeal. In response, Governor Riley has argued that the declaratory judgment which failed to effect final relief was not a final judgment for purposes of an appeal. Governor Riley believes that his appeal in *Riley v. Kennedy* was timely, and the United States has agreed with the Governor's position. The United States Supreme Court has not decided the issue, however. Moreover, unlike the subsequent injunction at issue in *Riley v. Kennedy*, the injunction in this case springs into being upon the occurrence of events, without further order of the United States District Court. In any event, both the circumstances of this case and prudence dictate that a notice of appeal be filed at this time. Governor Riley reserves his right to file additional notices of appeal, as necessary, should the injunctive relief contemplated by the *Judgment* (doc. 29) and the *Amended Judgment* (doc. 33) actually spring into being next month, or should other relief be awarded to the plaintiff.

This appeal is taken pursuant to 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."); 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); and, 28 U.S.C. § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.").

Respectfully submitted,

Troy King (KIN047)
Attorney General

s/ Margaret L. Fleming
Margaret L. Fleming (FLE001)
James W. Davis (DAV103)
Misty S. Fairbanks (FAI005)
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Counsel for Governor Riley

[Certificate of Service omitted]

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite,

standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in

accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Act No. 784 H. 950 – Gafford

AN ACT

To provide that when a vacancy occurs on the governing body of Jefferson County, the Election Commission of Jefferson County shall adopt a resolution providing for a special election, with a run-off election, if necessary, to fill such vacancy; to provide how a person shall become a candidate for the office to be filled; to provide that any person elected to fill a vacancy hereunder shall serve the unexpired term which the person occupying said office when the vacancy occurred would have served if the vacancy had not occurred; to provide that the general laws of the State governing elections shall apply to any election held under the Act, except as the Act otherwise provides; to provide that no person shall be appointed to fill such vacancy; and to repeal Section 145, Title 62, Code of Alabama of 1940, and any other laws or parts of laws in conflict with the Act.

Be It Enacted by the Legislature of Alabama:

Section 1. As herein used, the following terms have the meanings hereby ascribed to them: "the County" means Jefferson County, Alabama; "a vacancy" means a vacancy on the governing body of the County caused by death, resignation, impeachment, or any cause except normal expiration of terms; "first election hereunder" means the first election for which this Act provides to fill a vacancy as distinguished from the run-off election held hereunder, if a run-off election is necessary; "run-off election hereunder" means the run-off election for

which this Act provides, if no candidate at the first election hereunder receives a majority of the votes cast; "a County wide election" means any election, whether general, special or primary, including run-off elections, whereat qualified electors throughout the County are entitled to vote and which is held to elect a Federal, State or County officer or to nominate a candidate or candidates, for a Federal, State or County office or offices, to submit one or more questions, including, but not limited to, the question of adopting a proposed amendment to the Constitution of Alabama and the question of whether general obligation bonds, or revenue bonds, of the State or County shall be issued; "a scheduled County wide election" means a County wide election which is scheduled to be held on a date definitely determined when a vacancy occurs; and "the Election Commission" means the Election Commission of the County.

Section 2. Within seven days from the occurrence of any vacancy the Election Commission, by a majority vote thereof, shall adopt a resolution stating the dates on which the first election hereunder and the run-off election hereunder, if necessary, will be held. The said dates will be determined as provided for in Section 3 and 4, below.

Section 3. If when a vacancy occurs a County wide election is scheduled to be held more than forty days and not more than 180 days from the date whereon the vacancy occurs, the first election hereunder, to fill such vacancy, shall be held on the County wide election date. If when the vacancy occurs there is no County wide election scheduled to be held more than forty days and not more than 180 days after the date whereon the vacancy occurs the

first election hereunder, to fill the vacancy, shall be held on a date specified by the Election Commission in the resolution, provided for in Section 2, above, which date shall be not less than thirty-three days and not more than forty days from the date on which the resolution is adopted.

Section 4. If when the resolution, provided for in Section 2, above, is adopted, a County wide election is scheduled to be held not less than three weeks and not more than eight weeks from the date on which the resolution provides the first election hereunder shall be held, to fill said vacancy, the run-off election hereunder, if necessary, shall be held on the date on which said County wide election is scheduled to be held. If when the resolution, provided for in Section 2, above, is adopted, there is no County wide election scheduled to be held not less than three weeks and not more than eight weeks from the date on which the resolution provides for the first election hereunder to be held, the resolution shall provide for the run-off election hereunder, if any run-off election is necessary to be held three weeks subsequent to the date on which the first election hereunder will be held to fill the vacancy.

Section 5. Any person elected to fill a vacancy hereunder shall serve the unexpired portion of the term which the person occupying said office when the vacancy occurred would have served if the vacancy had not occurred.

Section 6. The first election hereunder and the run-off election hereunder, if a run-off election is required, shall be held on the dates provided for in the resolution adopted under Section 2, above. The provisions of the election laws governing the

registration of voters, equipment at polling places, furnishing of supplies, appointment of election officers, voting and canvassing returns at a general election shall apply to any election held hereunder, except as herein otherwise provided.

Section 7. The failure of the Election Commission to provide for the first election hereunder, or the run-off election hereunder, within seven days from the occurrence of a vacancy shall not terminate the jurisdiction and duty of the Election Commission to provide for such first election or such run-off election.

Section 8. No primary election shall be held to nominate a candidate to fill a vacancy under the provisions of this Act. At any election held under this act no person's name shall appear on the ballot as a candidate for the office to be filled at said election unless such person has filed in the office of the Judge of Probate of the County within the time and in the forms prescribed below in the Section 8 his statement of candidacy and the petition signed by at least one hundred qualified electors requesting that such person become a candidate for the said office.

Any person desiring to become a candidate at any election hereunder may become such candidate by filing in the office of the Judge of Probate of the County such person's statement in writing of such candidacy, accompanied by such person's affidavit taken and certified by such Judge of Probate, or by a Notary Public, that such person is duly qualified to hold the office for which the person desires to be a candidate. Such statement shall be filed at least twenty-one days before the date set for such election;

and shall be in substantially the following form:

"State of Alabama, Jefferson County.

I, the undersigned, being first duly sworn, depose and say that I am a citizen of Jefferson County in Alabama, residing at _____ in said County, that I desire to become a candidate for the office of _____ at the election for said office to be held on the _____ day of _____, and that I am duly qualified to hold said office if elected thereto; I hereby request that my name be printed on the official ballot at said election.

Signed _____

Subscribed and sworn to before me, the undersigned (Probate Judge or Notary Public, as the case may be) on this the _____ day of _____, 19 _____

_____

(Judge of Probate or Notary Public as the case may be)"

Said statement shall be accompanied by a petition signed by at least one hundred persons who shall be qualified to vote at said election, requesting that such person become a candidate for said office at said election. The signers to said petition shall set forth their names in full and their residence addresses, and said petition shall be in substantially the following form:

"We, the undersigned, duly qualified electors of Jefferson County, and residing at the places set opposite our respective names, do hereby request that the name of _____ be placed upon the official ballot as a candidate for the office of _____ at the election for said office to be held in said County on the _____ day of

_____. We further state that we know that said _____ possesses the qualifications necessary for said office, and is in our judgment a fit and proper person to hold said office. Witness our hands on this the _____ date of _____, 19_____."

No name shall appear upon said ballot as a candidate for election except the names of such persons as have become candidates according to the provisions as set forth above. If voting machines are used in the County, the names of candidates shall be suitably placed on voting machines.

Section 9. No persons shall be appointed to fill a vacancy. Section 145, Title 62, Code of Alabama of 1940, and all other laws and parts of laws, whether general, local or special in conflict herewith, are hereby repealed to the extent of any such conflict.

Section 10. This Act shall become effective upon its approval by the Governor or its otherwise becoming a law.

Approved May 25, 1977.

Time: 4:30 P.M.

Act No. 2004-455 S. 331 – Senator Holley

AN ACT

To amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of county commissioner.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 11-3-6 of the Code of Alabama 1975, is amended to read as follows:

"§11-3-6.

"Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Section 2. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

Approved May 14, 2004

Time: 11:15 A.M.

Act No. 2007-488 H. 139 – Rep. Lindsey

AN ACT

* * *

Be It Enacted by the Legislature of Alabama:

Section 1. Sections 11-1-8, 11-3-1, 11-3-2, 11-3-3, 11-3-7, 11-3-8, 11-3-18, 11-3-20, 11-3-21, 11-3-22, 11-8-3, 11-8-9, and 11-8-10, Code of Alabama 1975, are amended to read as follows:

* * *

"§11-3-1

* * *

"(b) Unless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor. If the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-16-11, the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein. The person so appointed to fill the vacancy shall meet the residency requirements in subsection (a), and shall hold office from the date of appointment until the eighth day following the next general election. If the original term in which the vacancy occurred would not have expired on the eighth day following the next general election after the appointment, the person elected at the election

required by operation of this subsection shall serve for a period of time equal to the remainder of the term in which the vacancy was created. Thereafter, election for the county commission seat shall be as otherwise provided by law.

* * *

"(f) Except as specifically provided in subsections (b) and (c), this section applies in all counties and may not be altered or amended by local law. Any existing local law or portion thereof in conflict with this section is specifically repealed to the extent of the conflict effective with the next election following the effective date of the act adding this subsection. It is the intent of the foregoing that a portion of a local law in direct conflict with this section shall be repealed, and any remaining portions of the local law not in conflict shall remain in full force and effect.

* * *

Section 3. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

Approved June 14, 2007

Time: 5:00 P.M.

Official Recompilation of the Constitution of Alabama of 1901, as Amended

Article IV.

Legislative Department.

Sec. 105. Special, private or local laws – Prohibited in cases provided for by general law; exception as to time of holding courts; partial repeal of general laws.

No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law.

Willie H. STOKES

v.

Lionel W. "Red" NOONAN, in his capacity as Judge of the Probate Court of Mobile County, et al.

86-1082.

Supreme Court of Alabama.

Sept. 30, 1988.

BEATTY, Justice.

The plaintiff, Willie H. Stokes, appeals from a judgment in favor of defendant Lionel W. "Red" Noonan, et al., holding that Act No. 85-237, Acts of Alabama 1985, is valid and constitutional.

Stokes, as a registered voter, taxpayer, and real property owner of Mobile County, filed suit in April 1987 contesting the constitutionality of Act No. 85-237, which provides for the filling of vacancies on the Mobile County Commission by a special election when at least 12 months remain on any commissioner's unexpired term:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in

> the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Stokes contends that the subject of local Act No. 85-237 is subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), is unconstitutional.

Section 105, in pertinent part, states: "No special, private, or local law . . . shall be enacted in any case which is provided by a general law." Section 11-3-6, Code of 1975, is contained in the chapter pertaining to county commissions and refers to vacancies:

> "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed."

Stokes also contends that Act No. 85-237 violates Art. IV, § 104(29), Constitution of 1901, which states, in pertinent part:

> "The legislature shall not pass a special, private, or local law in any of the following cases:
>
> ". . . .
>
> "(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of organization of new counties, or the changing of the lines of old counties . . . ."

We need not address the plaintiff's attacks under § 104(29) because we are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), this Court explained at length the difference between a local law and a general law, and, applying the literal language of the Constitution of 1901, held that the presence of a general law upon a given subject was *primary*, meaning "that a local law cannot be passed upon that subject." This Court added at 813:

> "By constitutional definition a general law is one which applies to the whole state and to each county in the state with the same force as though it had been a valid local law from inception. Its passage is none the less based upon local considerations simply because it has a statewide application, and already having that effect, the constitutional framers have prohibited the enactment of a local act when the subject is already subsumed by the general statute."

Section 11-3-6 is a statewide statute governing the general subject of filling vacancies on county commissions. Its language is substantially the same as its complementary section that appeared in Ala.Code 1940 as Title 12, § 6. See also Ala.Code 1940, Title 12, § 6 (Recomp.1958).

Act No. 85-237 was approved April 8, 1985. By its terms, it is made applicable only to Mobile County. Hence, when it became law it applied to a political subdivision of the state less than the whole, and thus, it was a local law on the same subject as the previously enacted general law, § 11-3-6; see

Constitution of 1901, § 110; *Peddycoart,* 354 So.2d at 814; and, accordingly, it is unconstitutional under § 105. We cannot, therefore, agree with the defendant that the Mobile County Commission, because of statutory history, has always been, and therefore is still, governed by local law. To approve such a proposition here would run directly counter to the language of our constitution. Surely, it cannot be held that the legislature is proscribed from enacting general laws on subjects already covered by local laws, even if by application such local laws are repealed, when the intent of the legislature is clear—and it is in this case. See *Buskey v. Mobile County Board of Registrars,* 501 So. 2d 447 (Ala.1986).

In *Baldwin County v. Jenkins,* 494 So. 2d 584 (Ala.1986), a similar question dealing with the constitutionality of a local act was resolved. In that case, this Court was confronted with two statutes dealing with the election and terms of the office of county commissioners. This Court held that the general statute, Code of 1975, § 11-3-1, as amended, having contained the language, "unless otherwise provided by local law," manifested a legislative intent that the subject it dealt with not be subsumed within it:

> "A situation completely opposite and contrary to the one presented here was contemplated and prohibited by the constitutional framers, which is to say that the legislature, by enacting a general law *containing no such provision or exception for contrary local laws,* thereby intended that general law to be *primary* and the subject subsumed entirely by the general law. In that situation, § 105 does operate to prohibit

> the enactment of contrary local laws. Such is not the case with respect to § 11-3-1 and Act No. 84-639. Because the language of the statute provides for the existence of and prevailing effect of contrary local laws, it must be that the legislature did not intend the subject to be 'subsumed' exclusively within § 11-3-1. That being the case, the co-existence of the general law (§ 11-3-1) and the *contrary* local law (Act No. 84-639) deferred to in the general law, cannot be said to be repugnant to § 105 because 'the constitutional framers have [only] prohibited the enactment of a local act when the subject [as intended by the legislature] is already subsumed by the general statute.' *Peddycoart*, [354 So.2d at 813]."

494 So. 2d at 587. (Emphasis in *Jenkins*.)

No such intent is demonstrated by the language of § 11-3-6 regarding filling of vacancies, and that language must be given effect according to its terms. Thus, it is our duty to declare Act No. 85-237 unconstitutional as violating § 105. It follows that the judgment appealed from must be, and it is hereby, reversed, and a judgment rendered declaring that Act unconstitutional.

REVERSED AND JUDGMENT RENDERED.

TORBERT, C.J., and JONES, SHORES and HOUSTON, JJ., concur.

MADDOX, J., concurs specially.

ALMON, J., concurs in the result.

ADAMS and STEAGALL, JJ., dissent.

MADDOX, Justice (concurring specially).

I concur completely with the opinion holding that Act No. 86-237 is unconstitutional under § 105, under this Court's decision in *Peddycoart*, cited in the majority opinion.

I do not believe it is necessary to distinguish *Baldwin County v. Jenkins,* 494 So.2d 584 (Ala.1986), which I thought was incorrectly decided, for the reasons I expressed in a dissent in that case; therefore, I concur specially.

STEAGALL, Justice (dissenting).

I respectfully dissent as to the majority opinion's reversal of the trial court's decision that Act No. 85-237 is valid and constitutional.

The Mobile County Commission was created on August 7, 1957, when the Alabama Legislature passed Act No. 181, Acts of Alabama 1957, a local act. The Act created the Mobile County Commission out of the existing board of revenue and road commissioners and provided for the election of its members, those members' terms of office, qualifications for that office, and various other requirements dealing with that body, including the filling of vacancies when they occurred. That Act states specifically:

> "Vacancies on the commission shall be filled by appointment by the Governor, but the office of president of the commission shall be filled by the members thereof. Any person appointed to fill a vacancy shall serve the unexpired term, and until his successor is elected and qualified."

Act No. 181, § 2(b), Acts of Alabama 1957, at 234.

The local act being question here, Act No. 85-237, Acts of Alabama 1985, states, in regard to vacancies on the Mobile County Commission:

> "Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term."

Act No. 85-237, Acts of Alabama 1985, at 137.

This Court has on several occasions upheld trial courts' rulings that a local act amending a local act is not unconstitutional. In *Freeman v. Purvis,* 400 So.2d 389 (Ala.1981), the Court upheld a trial court ruling which found that:

> "Act 80-797 passed in the 1980 regular session of the Legislature of Alabama, is a Local Act which amends a local act and is not unconstitutional."

400 So.2d at 390. The Court then stated:

> "Accordingly, the trial court was correct when it held that Act No. 797 was a local law which amended Act No. 710, a pre-existing local law."

400 So.2d at 392.

Local Act 85-237 is amendatory in nature, affecting the already-existing local legislation, which created the Mobile County Commission and provided for the filling of vacancies.

In *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala.1978), we stated, regarding legislation passed before and after that decision:

> "Henceforth when at its enactment legislation is local in its application it will be a local act and subject to all of the constitutional qualifications applicable to it. With regard to legislation heretofore enacted, the validity of which is challenged, this Court will apply the rules which it has heretofore applied in similar cases."

354 So.2d at 814.

The effect of this passage was to say that the new standard established in *Peddycoart* as to the constitutionality of local legislation would be applied only prospectively. *Ex parte Bracewell*, 407 So.2d 845 (Ala.1979), *reversed on other grounds*, 457 U.S. 1114, 102 S. Ct. 2920, 73 L.Ed.2d 1325 (1982). Where, as here, we are looking at legislation enacted prior to *Peddycoart* but amended afterwards, this Court is required to apply the law as it stood before *Peddycoart*. That law can be found in the case of *Johnson v. State ex rel. City of Birmingham*, 245 Ala. 499, 17 So.2d 662 (1944):

> "Sec. 105 of the Constitution is not construed to inhibit local legislation on a subject not prohibited by the Constitution, merely because the local law is different, and works a partial repeal of a general law."

245 Ala. at 503, 17 So.2d at 664, citing *Talley v. Webster,* 225 Ala. 384, 143 So. 555 (1932). This Court, in *Talley v. Webster,* in determining whether a statute violated Section 105 of the Constitution, stated:

> "We need not review the numerous cases construing this section. Suffice it to say it does not inhibit the passage of local laws on subjects, not prohibited by Section 104, merely because such local law is different, and works a partial repeal of the general law of the state in the territory affected."

225 Ala. at 385, 143 So. at 555.

In the case of *Norris v. Seibels,* 353 So.2d 1165 (Ala.1977), this Court reversed a judgment of the Alabama Court of Civil Appeals and held that a showing of specific legislative intent was necessary to effect any such repeal:

> "This general statute cannot be repealed by implication found in the local statute unless the legislative intent to effect such a repeal is clearly manifested."

353 So. 2d at 1167. This Court held that the language used in the questioned local statute contained no express repeal of the general statute. However, such is not the case here. Section 3 of Act 85-237, Acts of Alabama 1985, demonstrates a specific legislative intent by expressly repealing "[a]ll laws or parts of laws which are in conflict with this act."

Because I believe that Act 85-237, a local act, is amendatory in nature and therefore that the law to be applied is that existing prior to our decision in

Peddycoart, supra, I believe the trial court's judgment should be affirmed.

ADAMS, J., concurs.

Bob RILEY, as Governor of Alabama

v.

Yvonne KENNEDY et al.

1050087.

Supreme Court of Alabama.

Nov. 9, 2005.

Rehearing Denied Nov. 15, 2005.

STUART, Justice.

Bob Riley, in his official capacity as Governor of Alabama, appeals a judgment of the Montgomery Circuit Court holding that a vacancy on the Mobile County Commission should be filled by a special election. We reverse and remand.

Facts

In an election held on September 13, 2005, Sam Jones, the county commissioner for district 1, Mobile County Commission, was elected to the office of mayor of the City of Mobile. On September 19, 2005, Yvonne Kennedy, James Buskey, and William Clark, registered voters in Mobile County and residents of district 1 (hereinafter referred to collectively as "Kennedy"), filed a pleading in the Montgomery Circuit Court containing the following: a complaint seeking a declaration as to whether Alabama law requires the vacancy in the district 1 seat on the County Commission to be filled by a special election; a petition for a writ of mandamus directing Don Davis, probate judge of Mobile County

to conduct such a special election to fill the district 1 seat; and a request for an injunction prohibiting Governor Riley and the other defendants[1] from acting to the contrary.

According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the County Commission to assume the office of mayor. Kennedy averred that Governor Riley could not make such an appointment, because, she argued, Act No. 85-237, Ala. Acts 1985, requires that "a special election be held to fill the vacancy, and, if a special election is not held, [Kennedy] and other similarly situated registered voters of the County of Mobile will be disenfranchised and denied the opportunity to vote for a candidate of their choice to fill the vacancy mentioned."

Governor Riley answered the complaint, asserting that he is authorized by general law to fill the vacancy and that Act No. 85-237, Ala. Acts 1985, relied on by Kennedy, was declared unconstitutional by this Court in *Stokes v. Noonan*, 534 So.2d 237 (Ala.1988). Act No. 85-237, he argues, is therefore void, and it was not revived, as Kennedy argues, by the legislature's subsequent enactment of Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala.

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1. In addition to naming Governor Riley as a defendant, the complaint also named Don Davis, in his official capacity as probate judge of Mobile County; the Mobile County Commission; and Stephen Nodine and Mike Dean, in their official capacities as members of the Mobile County Commission. Governor Riley is the only defendant who appealed.

Code 1975.

On September 29, 2005, after hearing argument by counsel, the Montgomery Circuit Court, apparently giving a field of operation to Act No. 85-237, Ala. Acts 1985, held that the vacancy on the Mobile County Commission must be filled by a special election rather than by appointment by the Governor. On October 3, 2005, Sam Jones, the commissioner for district 1, resigned to assume the office of mayor of the City of Mobile. On October 11, 2005, Governor Riley appealed.

Standard of Review

> " 'This court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.' *Scott Bridge Co. v. Wright,* 883 So.2d 1221, 1223 (Ala.2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. *Carter v. City of Haleyville,* 669 So.2d 812, 815 (Ala.1995)."

Continental Nat'l Indem. Co. v. Fields, 926 So.2d 1033, 1034-35 (Ala.2005).

Discussion

Governor Riley contends that Act No. 2004-455, Ala. Acts 2004, amending § 11-3-6, Ala. Code 1975, did not revive Act No. 85-237, Ala. Acts 1985, which this Court had held unconstitutional, see *Stokes v. Noonan,* and that, therefore, the trial court erred in declaring that the vacancy on the Mobile County Commission created by Jones's resignation should be

filled by a special election.[2]

In *Stokes,* this Court addressed the constitutionality of Act No. 85-237, which provided that vacancies on the Mobile County Commission would be filled by a special election when at least 12 months remained on the unexpired term of any commissioner. The registered voter challenging Act No. 85-237 in *Stokes* argued that Act No. 85-237, a local act, was subsumed by a general law, § 11-3-6, Ala. Code 1975, and, consequently, was unconstitutional under Art. IV, § 105, Alabama Constitution 1901.

Act No. 85-237 provided:

> " 'Whenever a vacancy occurs in any seat on the Mobile County Commission with twelve months or more remaining on the term of the vacant seat, the judge of probate shall immediately make provisions for a special election to fill such vacancy with such election to be held no sooner than sixty days and no later than ninety days after such seat has become vacant. Such election shall be held in the manner prescribed by law and the person elected to fill such vacancy shall serve for the remainder of the unexpired term.' "

534 So.2d at 238. We held that Act No. 85-237, applicable only to Mobile County, constituted a local law on the same subject as the previously enacted general law. We then considered § 11-3-6, Ala.Code

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2. We review this issue only as presented by these facts and by the parties' arguments regarding these facts; we do not address any other possible impediments that may exist to the constitutionality or enforceability of Act No. 85-237.

1975, which appears in Chapter 3, Title 11, of the Alabama Code pertaining to county commissions. It provided at the time we decided *Stokes:* " 'In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed.' " 534 So.2d at 238. We recognized that § 11-3-6 is clearly a general law, a statewide statute addressing the filling of vacancies on county commissions throughout the State, and that the legislature did not in the language of § 11-3-6, Ala.Code 1975, manifest an intent to except the local law from the general law. Therefore, we held that Act No. 85-237 was contrary to § 11-3-6, Ala. Code 1975, and, consequently, that it violated Art. IV, § 105, Alabama Constitution 1901, which provides, in pertinent part: "No special, private, or local law . . . shall be enacted in any case which is provided for by a general law." We reasoned that because the legislature did not in § 11-3-6, Ala. Code 1975, manifest an intent to except the local law from the general law, the contrary local law, in that case Act No. 85-237, must defer to the general law, § 11-3-6, Ala. Code 1975, and, consequently, we held, Act No. 85-237 violated Art. IV, § 105, Alabama Constitution 1901.

On May 14, 2004, Governor Riley approved Act No. 2004-455 and it became effective. Act No. 2004-455 amends § 11-3-6, Ala.Code 1975, to read as follows: "Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed."

Kennedy argues that Act No. 2004-455, which amended § 11-3-6, Ala. Code 1975, manifests an intent by the legislature to cure the impediment to the enforceability this Court found as to Act No. 85-237 and to now give effect to that Act and that, consequently, a special election is the proper procedure by which to fill the vacancy created on the Mobile County Commission by Jones's resignation. We cannot agree with that conclusion because the language of Act No. 2004-455 does not clearly so indicate.

This Court has consistently held that

> " 'statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction. *Sutherland Stat. Const.*, § 41.04 (4th ed 1984).'
>
> "*Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala.1987)."

Gotcher v. Teague, 583 So. 2d 267, 268 (Ala.1991). Moreover, although curative statutes are "of necessity" retroactive, *Horton v. Carter*, 253 Ala. 325, 328, 45 So. 2d 10, 12 (1950), even they are subject to the same rule of statutory construction, i.e., they will not be construed as retroactive unless the intent of the legislature that the statute have such retroactive effect is clearly expressed. The act under consideration in *Horton* expressly provided: "This Act shall be deemed retroactive in its effect upon its passage and approval by the Governor or upon its

otherwise becoming a law." 253 Ala. at 328, 45 So. 2d at 12. On numerous other occasions the legislature has demonstrated its ability to provide expressly for retroactive effect when enacting curative legislation. See, *e.g.*, § 34-8-28(h), Ala. Code 1975 ("The provisions of this amendatory section are remedial and curative and shall be retroactive to January 1, 1998."); § 11-50-16(c), Ala. Code 1975 ("The provisions of this section shall be curative and retroactive . . . ."); § 11-43-80(d), Ala.Code 1975 ("The provisions of this section shall be curative and retroactive . . . ."); and Act No. 2001-891, § 5, Ala. Acts 2001 ("It is the intent of the Legislature that this act be construed as retroactive and curative.").

Here, the plain language in Act No. 2004-455, amending § 11-3-6, Ala. Code 1975, provides for prospective application only, and that language must be given effect according to its terms. Nothing in the language in Act No. 2004-455 demonstrates an intent by the legislature that the amendment of § 11-3-6 apply retroactively. The argument that Act No. 2004-455 applies prospectively only is further supported by the preamble of the Act, which provides that the purpose of the Act is "[t]o amend Section 11-3-6 of the Code of Alabama 1975, relating to county commissions, *to authorize the Legislature by local law to provide for the manner of filling vacancies in the office of the county commission.*" (Emphasis added.) The language "to authorize the Legislature . . . to provide" the means by which vacancies on the county commission are to be filled further indicates an intention by the legislature that the Act is to be prospectively applied. Therefore, we hold that Act No. 2004-455 applies prospectively only;

consequently, Governor Riley is authorized to fill the vacancy on the Mobile County Commission by appointment.

Conclusion

Based on the foregoing, we conclude that the trial court erred in holding that the vacancy on the Mobile County Commission should be filled by a special election. Its judgment so holding is, therefore, reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NABERS, C.J., and SEE, LYONS, HARWOOD, SMITH, BOLIN, and PARKER, JJ., concur.

WOODALL, J., concurs in the result.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

FRED L. PLUMP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	2:07-cv-01014-MEF-CSC
BOB RILEY,	)	
Governor,	)	
	)	
Defendant.	)	

SECOND NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(filed May 20, 2008)

The defendant Bob Riley, in his official capacity as Governor of the State of Alabama, hereby appeals to the Supreme Court of the United States from the *Judgment* entered in this case on January 22, 2008, (doc. 29) and the *Memorandum Opinion* of the same date (doc. 28), as amended by this Court's *Order* of January 25, 2008, (doc. 32) and reduced to an *Amended Judgment* (doc. 33) on the same date. This appeal is intended to be fully inclusive of any and all matters currently, finally resolved by the district court and thereby supporting an appeal.

Governor Riley filed a notice of appeal on March 22, 2008. That notice is adopted and incorporated herein by reference. This second notice is filed in light of certain jurisdictional issues that will be addressed in Governor Riley's jurisdictional

statement to the United States Supreme Court, which will be submitted May 21, 2008.

The district court's amended judgment provided that Governor Riley's appointment of General George F. Bowman to the Jefferson County Commission would be vacated, "without further order of th[e] Court," if not precleared within 90 days of January 22, 2008. *Amended Judgment* (doc. 33). (Governor Riley submitted a request for preclearance to the United States Department of Justice, which was delivered on March 20, 2008. The submission is pending.) The original notice of appeal was filed within 60 days of that judgment, although the contingencies that would trigger the court's remedy order had not come about.

On April 16, 2008, the district court denied Governor Riley's motion to stay, but stayed its judgment "until the earlier of sixty days from the date of the preclearance submission, or the date of the written response by the Attorney General to [the] preclearance submission." *Order* (doc. 45). On April 18, 2008, the United States Supreme Court entered an order staying the judgment of the district court.

This Second Notice of Appeal is filed within 60 days of April 21, 2008 – the date that the appointment would have been vacated by operation of the Amended Judgment, if not stayed. This Second Notice of Appeal is also filed within 60 days of May 19, 2008, the latest date on which the appointment would have been vacated pursuant to the district court's judgment and stay order, if the United States Supreme Court had not entered a stay.

This appeal is taken pursuant to 42 U.S.C. § 1973c(a) ("Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."); 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."); and, 28 U.S.C. § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.").

Respectfully submitted,

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[Certificate of Service omitted]